

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-214026

DATE: September 28, 1984

MATTER OF: D. Moody & Co., Inc.

DIGEST:

1. Where agency mails to the protester a letter stating that the protester's offer of surplus spare parts was not acceptable and explaining the reasons for that determination, and the protester does not deny receiving the letter, a protest of the agency's rejection of the offer filed with GAO more than 5 weeks after the agency mailed the letter is untimely.
2. Protest that agency improperly rejected an offer of surplus spare parts under a solicitation that required the parts to be unused is sustained where the agency's only reason for rejecting the offer--that there is no practical way for it to determine whether the offered parts are in fact unused--applies equally to offers from manufacturers as well as to those from surplus dealers and therefore does not provide a rational basis for rejecting offers from the latter but not the former.
3. Where the agency rejects an offer of surplus spare parts because it says that technical data necessary for inspection are unavailable, the protester has not met its burden of proof merely by alleging that technical data are available.

D. Moody & Co., Inc. protests the rejection of its offers to supply unused surplus aircraft parts in response to request for proposals (RFP) Nos. F34601-83-11651 ^{1/}, F34601-83-33123, F34601-83-12532, and F34601-84-42724, issued by the Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma. We sustain the protest in part, deny it in part, and dismiss it in part as untimely.

The solicitations were for various types and quantities of aircraft spare parts and listed by manufacturer's part numbers and National Stock Numbers (NSN) the parts that would be acceptable. Each solicitation contained a "New Material" clause which required offerors to represent that the parts to be supplied, including any former government property, would be "new," meaning "not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety." See Defense Acquisition Regulation (DAR), § 7-104.48, reprinted in 32 C.F.R. pts. 1-39 (1983). In addition, solicitation Nos. 12060, 33123 and 42724 contained a "Government Surplus" clause which required an offeror of former government surplus property to attach to its offer a separate sheet containing a complete description of the items, the quantity to be supplied, the name of the agency from which the items were acquired, and the date of acquisition. See DAR, § 7-104.49.

In response to each of these solicitations, Moody offered to supply listed parts and indicated that the parts would be "new surplus certified." On separate forms provided to it by Tinker, Moody listed the part numbers and corresponding National Stock Numbers, indicated the quantity of the parts that it would supply, and certified that it had obtained the parts from the Defense Property Disposal Service in either 1979 or 1980. The form also

^{1/} Moody said initially that its protest involved "solicitation No. 83-12060." This actually was purchase request No. FD2030-83-12060 which had been incorporated into an existing solicitation, F34601-83-11651. Since the parties consistently have referenced solicitation 12060 throughout this protest, we shall continue to do likewise.

required Moody to indicate which of four listed definitions described its surplus parts. The definitions were: (1) new unused, (2) new and reconditioned, (3) new and modified, and (4) new and overhauled. In each instance, Moody checked definition No. 2, which read:

"Material not having been previously installed and not showing rust, corrosion or other evidence of deterioration from age, improper packaging or preservation. Material may only be reconditioned to the extent that gaskets, seals, O-rings, etc., are replaced."

Under solicitation Nos. 12060 and 12532, Moody certified on the form that all cure-dated items ^{2/} would be replaced. Under solicitation No. 13323, Moody said that all cure-dated items would be changed "if required," and under solicitation No. 42724, it said that all such items would be changed "if necessary." The agency rejected Moody's offers under each of these solicitations.

Moody protested to this Office, initially citing nineteen solicitations and charging that Tinker had a blanket policy of rejecting all offers of surplus spare parts. As both parties now recognize, Moody's objections concerning all of the solicitations stemmed, at least in part, from Tinker's certification form, the use of which could result in an unintended conflict with the "New Material" clause, particularly when an offeror of surplus parts checks box No. 2. The problem is that although the Tinker form indicates apparent acceptability of parts in which the cure-dated items have been replaced, the form characterizes such parts as "reconditioned," a status that renders them unacceptable under the "New Material" clause.

^{2/}Cure-dated items are rubber-like components of a part--gaskets and O-rings, for example--which deteriorate with age regardless of whether the part is in use. The useful life of these components is measured from the cure-date.

Although the extent to which this apparent conflict may have contributed to the rejection of any of Moody's offers is unclear, both Moody and the Air Force agree that the form should be changed.

For various reasons, Moody withdrew its protest with regard to fifteen of the solicitations. Moody maintains, however, that its offers in response to the following four solicitations were improperly rejected.

Solicitation No. 12060

In response to solicitation 12060, Moody offered to supply four pumps and specified P/N AA19529B, NSN 4320-00-684-6070HS, one of the approved parts listed in the solicitation. Moody's offer stated that the parts would be "overhauled, tested and certified serviceable . . . in conformance with the latest technical order." Moody later amended its offer by stating that the items would be "new surplus." The agency notified Moody by letter dated November 18 that its offer was unacceptable and briefly explained the reasons for that determination. Moody protested to this Office on December 27.

The Air Force argues that Moody's protest to this Office is untimely because it was filed more than 5 weeks after the notice of rejection was mailed despite the requirement of our Bid Protest Procedures that protests be filed within 10 working days of the date the basis for the protest is known or should have been known. See 4 C.F.R. § 21.2(b)(2) (1984). Moody denies that its protest is untimely, arguing that it was not informed prior to filing its protest that its offer had been determined unacceptable or that award had been made to any other firm. Moody makes no reference in its submissions to the November 18 letter, even though the Air Force cites the letter specifically as the basis for its argument that the protest is untimely. Moody says it filed its protest when it did because it believed that its offer would be rejected in accordance with Tinker's blanket policy of rejecting all offers of surplus. Moody adds that even if its protest is untimely, it should be considered nevertheless since it raises a significant procurement issue. See 4 C.F.R. § 21.2(c).

We agree with the Air Force that Moody's protest with regard to this solicitation is untimely. We presume that Moody received the November 18 letter within a reasonable time of when it was mailed, see United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, B-211916, June 27, 1983, 83-2 CPD ¶ 29, and we note that Moody does not deny receiving it. Therefore, the late December protest must be viewed untimely. Moreover, we do not consider it as raising a significant issue as we have dealt with the essential issue of that protest in other cases. See D. Moody & Co., Inc., et al., 55 Comp. Gen. 1 (1975), 75-2 CPD ¶ 1; D. Moody & Co., Inc., 53 Comp. Gen. 742 (1974), 74-1 CPD ¶ 171.

Solicitation Nos. 12532 and 42724

Solicitation No. 12532 was for a total of six landing gear sequence valves, P/N 1374-559318M1, NSN 4810-00-659-4735HS, and, as indicated, the "New Material" clause required the valves to be new. Moody submitted a timely offer of six of the listed parts at \$848 each and said that the parts would be "new surplus certified." The manufacturer submitted an offer at \$1300 each. Moody's offer was rejected and award was made to the manufacturer.

Solicitation No. 42724 was for a total of 21 control valves, P/N 23665-6, NSN 165-000-373-7277, and also incorporated the "New Material" clause. Moody offered 21 of the listed parts at \$1650 each and stated that the parts would be "new surplus certified." The manufacturer offered the parts at \$2137 each. Moody's offer was rejected, but the Air Force reports that no award has been made yet.

Moody's offers under both solicitations were rejected based on substantially identical reports by Air Force engineers which stated that even though the parts might pass a functional test and therefore be considered serviceable, this would not establish that the parts were new and unused. The reports noted that a part that had been overhauled (presumably after having been used) might also be considered serviceable after passing a functional test, but, of course, could not be considered new and unused. Another engineer's report in the record explains that the only way to determine whether a part is in fact new and unused is to disassemble the part and subject each

component to dimensional and physical examination, a procedure that the engineer concludes is impractical. The Air Force concluded that since the parts procured must perform critical functions, and therefore must be new and unused, offers of surplus were not acceptable.

Moody first questions the requirement in these solicitations that the parts be new. Moody contends that the government has adequate functional and dimensional tests to determine whether a part is serviceable and meets all requirements and that any part that can pass these tests is equivalent to any other part. Further, Moody rejects the argument that the Air Force is unable to distinguish used from unused parts. It says that used parts normally will show signs of wear or deterioration and that other tests are available to detect previous use. In any event, says Moody, if the Air Force cannot determine whether parts offered by a surplus dealer are in fact unused, then the same is true of parts offered by the manufacturer.

Moody's objection to the requirement in these solicitations that the parts be new and unused involves an alleged solicitation impropriety. As such, any protest concerning this requirement should have been filed, either with the agency or this Office, prior to the closing dates for receipt of proposals. 4 C.F.R. § 21.2(b)(1). Since Moody did not file its objection to the new parts requirement until after the closing dates, it is untimely.

As to the rejection of Moody's offers, we sustain the protest because the record does not establish that the Air Force rejected the offers on a rational basis.

We have recognized that when the government receives an offer to supply surplus goods, it may have legitimate concerns over where, when, why and how the goods became surplus. D. Moody & Co., Inc., 56 Comp. Gen. 1005 (1977), 77-2 CPD ¶ 233. These concerns are reflected in the "Government Surplus" clause, which requires that offers of former government surplus be accompanied by information addressing these matters. In addition, an agency may require that offers of surplus also be accompanied by

historical data sufficient to establish that the items were subjected to the necessary quality controls when manufactured. See Hill Industries, Inc., B-209884, Aug. 24, 1983, 83-2 CPD ¶ 246. Once the surplus dealer complies with these or other reasonable requirements for information, however, and assuming that the offer is of items that meet the technical specifications, there may well be no distinction between the parts furnished by the surplus dealer and ones that may be obtained from the manufacturer. See Hill Industries, Inc., supra. Any further distinction that the procuring agency may wish to draw must proceed from a rational basis and not from a basic distrust of offers of surplus or a mere preference for new manufacture.

In this case, the requirement that the valves be new and unused was based on the agency's technical judgment that the critical nature of the functions that these valves were to perform would not allow for purchasing parts that had had portions of their useful lives consumed. We cannot question the agency's judgment in this regard. We cannot accept, however, the position that the lack of a practical means of determining whether a given part had been used--the only reason given for rejecting Moody's offers--is a logical reason to reject offers from surplus dealers but not from manufacturers. Obviously, if they so desired, manufacturers could also furnish items that previously had been used. The Air Force offers no reasons for this differentiation. We recognize, as stated above, that offers of surplus may often raise legitimate concerns over whether the surplus parts are truly the equivalent of newly manufactured parts. One of these concerns, certainly, is whether the surplus parts had ever been used. This concern can be addressed, however, by requiring the surplus dealer to account for the whereabouts of the items from the time of their manufacture to the present. If the dealer is unable to comply with this requirement, or otherwise does not provide an acceptable assurance that the items had not previously been used, an agency may properly reject the offer.

Here, the solicitation indicated that offers of new surplus would be acceptable. Moody certified that its parts would be new, reconditioned only to the extent that cure-dated items would be replaced, and that they formerly had been in the government's inventory. Moody took no exception to the requirement of the "New Material" clause

that the items not be used. No further assurance on this point was requested. Under these circumstances, we think the agency's rejections of Moody's offers were improper. We are recommending that, if otherwise proper, an award be made to Moody under solicitation 42724. We make no recommendation for corrective action under solicitation 12532 at this late date.

Solicitation No. 33123

Solicitation No. 33123 was for 788 safety relief valves, NSN 4820-00-793-5836HS, and specified the part numbers of three manufacturers. The closing date for receipt of offers was September 1, 1983. The solicitation contained the "New Material" clause and also a clause that required an offeror who intended to offer surplus valves to notify the contracting officer at least 10 days prior to the closing date. The purpose of this notice requirement was so that the agency could determine whether offers of surplus could be considered based on whether the part was critical and in light of the impossibility of applying normal in-process inspection and quality assurance procedures to surplus parts. The solicitation stated that if surplus parts were considered acceptable, the solicitation would be amended to incorporate inspection criteria sufficient to establish that the surplus parts met applicable specifications. The general inspection provisions of the solicitation imposed on the contractor the responsibility for inspection and required compliance with inspection standard MIL-I-45208A. See DAR, § 7-104.33.

By telegram dated August 16, 1983, Moody offered to supply 788 valves at \$98.80 each and specified one of the listed parts, Kelsey-Hayes part No. MC1613-1175. The offer stated that cure-dated items would be replaced. The Air Force did not respond to Moody or amend the solicitation prior to the closing date. The agency simply rejected Moody's offer based on a memorandum from the engineers, dated September 15, which read: "Tech Data and drawings are not available to perform acceptability inspection."

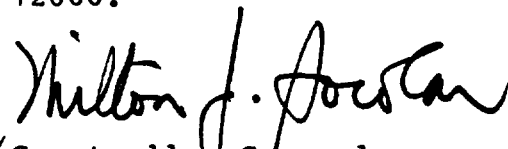
Moody challenges this basis for the rejection, contending that the replacement of cure-dated items is covered by an Air Force technical order (T.O. 9P5-2-38-3) and by

Kelsey-Hayes specifications. Moody claims the alleged unavailability of technical data and drawings is "inaccurate or irrelevant."

We are not certain as to what was meant by the memorandum of September 15; however, we gather that the engineers were concerned that the government would not be able to inspect the surplus parts adequately upon delivery to ensure that they met the specifications. Such a concern presumably would not obtain with respect to the manufacturer, who would be subject to the inspection standards of MIL-I-45208A, as required by DAR, § 7-104.33. In any event, although Moody cites a technical order and the manufacturer's specifications in support of its contention that the agency does indeed have adequate data for inspection purposes, we are advised by the agency that the technical order cited by Moody does not apply to this part and that it does not have access to the manufacturer's data or drawings. We think Moody has failed in its burden of proof on this issue. See Printer Systems Corp., B-213978, May 22, 1984, 84-1 CPD ¶ 546. We cannot say that the rejection of Moody's offer was improper.

Conclusion

We sustain Moody's protest with respect to solicitations 12532 and 42724; we recommend that award be made to Moody under solicitation 42724, but do not recommend corrective action under solicitation 12532. We deny Moody's protest under solicitation 33123 and dismiss it as untimely with respect to solicitation 12060.

for 
Comptroller General
of the United States